APPEAL NO. 040002
FILED FEBRUARY 13, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held with the record closing on April 28, 2003. The hearing officer reopened the record on April 29, 2003, and ordered the case back to a benefit review officer (BRO) on May 5, 2003, to seek clarification from the designated doctor on the issue of the respondent's (claimant) impairment rating (IR). A second CCH was held with the record closing on December 4, 2003, with the same hearing officer. The hearing officer determined that the claimant's IR is 16% as assessed by his treating doctor's report. The appellant (carrier) appealed, arguing that the hearing officer erred in determining that the designated doctor's report did not have presumptive weight, and in adopting the treating doctor's report. The claimant responded urging affirmance of the 16% IR per the treating doctor's report.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable left knee injury on _____, and that the claimant reached maximum medical improvement (MMI) on May 6, 2001. The claimant testified that on _____, he injured his the left knee when he fell through a hole on the inside of a trailer. The claimant underwent an arthroscopy and partial medial meniscectomy with debride of the damaged articular cartilage and medial femoral condyle, lateral femoral condyle, and patellofemoral joint of the left knee on June 8, 1999; and he underwent a second surgery for a torn medial meniscus, torn lateral meniscus and Grade III chondromalacia of the medial femoral condyle, lateral femoral condyle, and patellofemral joint of the left knee on January 15, 2001.

The treating doctor, Dr. N, certified MMI on October 23, 2001, with a 16% IR based on a 10% impairment for torn medial meniscus from Table 40, Disorder 2 (for one meniscus), 10% for torn lateral meniscus from Table 40, Disorder 2 (for one meniscus), and 20% Grade III chondromalacia from Table 40, Disorder 5, for a total of 40% lower extremity impairment or 16% whole person IR from Table 46 using the Guides to the Evaluation of Permanent Impairment, third edition, revised, dated December 1990, published by the American Medical Association (AMA Guides Revised, December 1990). The hearing officer noted in her decision that Dr. N used the wrong edition of the AMA Guides and that he "added" the impairment of the lower extremity rather than combining the impairments under the Combined Value Charts.

The designated doctor, Dr. K, assigned a 14% IR based on 10% impairment for torn medial meniscus from Table 36, Disorder 2 (for one meniscus), 10% for torn lateral meniscus from Table 36, Disorder 2, (for one meniscus), and 20% Grade III

chondromalacia from Table 36, Disorder 5, for a combined value of 35% lower extremity impairment or 14% whole person IR from Table 42 using the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides, 2nd printing, February 1989).

In evidence are two medical reports dated January 17, 2002, and February 2, 2002, that reflect Dr. N. stood by his 16% IR in accordance with the AMA Guides, 2nd printing, February 1989, rather than the AMA Guides, Revised, December 1990. We note that although Dr. N states in this report that he assigned an IR based on the AMA Guides, 2nd printing, February 1989, he refers to Table 40 of the AMA Guides, Revised, December 1990. Based on Dr. N's assessments of the claimant's IR, the Texas Workers' Compensation Commission (Commission) sent on two separate occasions requests for clarification to Dr. K. The designated doctor, Dr. K, responded to both requests separately on March 3, 2002, and May 2, 2003, that he stood by 14% IR.

On June 6, 2002, Dr. N reevaluated and reassessed the claimant's IR and assigned an 18% IR based on 25% impairment for torn medial and lateral menisci from Table 40, Disorder 2 (for both menisci), and 20% Grade III chondromalacia from Table 40, Disorder 5, for an "added" value of 45% lower extremity impairment or 18% whole person IR from Table 46 using the AMA Guides, Revised, December 1990. On June 13, 2002, Dr. N, corrected his assessment of the claimant's IR and assigned a 16% IR based on 25% impairment for torn medial and lateral menisci from Table 40, Disorder 2 (for both menisci), and 20% Grade III chondromalacia from Table 40, Disorder 5, for a "combined" value of 40% lower extremity impairment or 16% whole person IR from Table 46 and continued using the AMA Guides, Revised, December 1990.

The sole issue before the hearing officer was to determine the claimant's IR. On May 5, 2003, the hearing officer reopened and ordered the BRO to seek clarification from Dr. K as follows:

a. Does [Dr. K] agree with [Dr. N's] June 13, 2002 assessment? If not, please specifically explain why he disagrees with the assignment of 25% for both torn menisci?

b. Under Table 36, since the Claimant has two torn menisci in his left knee, shouldn't he be assigned impairment from 0-25% for both menisci collectively, as opposed to 0-10% for one menisci (times two for both menisci, which combines for 19%)? Please explain.

c. Does [Dr. K's] opinion remain the same regarding the Claimant's IR? Please explain. If it changes, please complete another [Report of Medical Evaluation] TWCC-69 form.

The evidence reflects that the Commission sent a letter of clarification to Dr. K on May 28, 2003, as instructed by the hearing officer. Dr. K did not respond to the Commission's letter of clarification and a second letter was sent to Dr. K on August 21,

2003. The evidence reflects that a response was received from Universal Medical Evaluators on October 8, 2003, that stated:

> [Dr. K] is not affiliated with any of our clinic locations. As per my last conversation with [Dr. K], his mother in law was extremely ill and he was not going to be able to perform examinations as a Designated Doctor any longer. We have not had any correspondence and have not worked with [Dr. K] since May 2002.

A second CCH was held with the record closing on December 4, 2003. The claimant contended that the designated doctor improperly applied the AMA Guides, 2nd printing, February 1989, by assigning an impairment for the lateral and medial menisci separately, from Table 36, Disorder 2 (one meniscus), between 0-10% impairment, rather than assigning a collective impairment, from Table 36, Disorder 2 (both menisci), between 0-25%. The claimant stated that he did not want a second designated doctor appointed because the case had "dragged" on long enough.

Section 408.125(e) provides that where there is a dispute as to the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. No other doctor's report, including that of a treating doctor, is entitled to presumptive weight, and to overcome the presumptive weight accorded to the report of the designated doctor requires more than a preponderance of the evidence, it requires the great "weight" of the other medical evidence to be contrary to the report. Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992.

In the instant case, the hearing officer questioned the designated doctor's report regarding the impairment assignment for both torn menisci under Table 36. Upon the Commission's request for clarification, it was apparent that the designated doctor was unavailable to provide a clarification regarding the claimant's IR. The hearing officer determined that the designated doctor's report was contrary to the great weight of the other medical evidence on the issue of the claimant's IR, and that it does not have presumptive weight. The hearing officer adopted the treating doctor's report that used the AMA Guides, Revised, December 1990, rather than the AMA Guides, 2nd printing, February 1989. Rule 130.1(c)(2)(B)(ii) provides that the appropriate edition of the AMA Guides to use for certifying examinations conducted on or after October 15, 2001 is "the third edition, second printing, dated February 1989 if, at the time of the certifying examination, there is a certification of MMI by a doctor pursuant to subsection (b) of this section made prior to October 15, 2001, which has not been previously withdrawn through agreement of the parties or previously overturned by a final decision." We believe the treating doctor's report cannot be adopted because he used the wrong version of the AMA Guides. *See* Rule 130.1(c)(2)(C).

Given that the hearing officer determined that the designated doctor's report was not entitled to presumptive weight and that the treating doctor's report is based on the wrong version of the AMA Guides, a second designated doctor should be appointed to determine the claimant's IR. In Texas Workers' Compensation Commission Appeal No. 011607, decided August 28, 2001, the Appeals Panel held that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Commission for clarification, or if he or she otherwise compromises the impartiality demanded of the designated doctor. It is only on the very rare occasion that a report of a designated doctor is not accepted and the appointment of a second designated doctor is necessary to establish an IR that conforms to the requirements and guidance of the AMA Guides. Texas Workers' Compensation Commission Appeal No. 941635, decided January 23, 1995. We find such circumstances in this case and accordingly find it necessary that another designated doctor be selected to evaluate the claimant.

We reverse the hearing officer's determination that the claimant's IR is 16% as assessed by the treating doctor and remand the case for the appointment of second designated doctor to assess the claimant's IR as of the MMI date of May 6, 2001, as stipulated by the parties. The designated doctor is instructed to use the AMA Guides, 2nd printing, February 1989.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBERT PARNELL
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Edward Vilano
Appeals Judge